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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Counsel for Petitioner

No. 86

GEORGE WILLIAM DODEZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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JOINT BRIEF FOR PETITIONERS

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JOINT BRIEF FOR PETITIONERS

Statement of Gibson Case

Jurisdiction

This court has jurisdiction of this case under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court May 7, 1934. The judgment of the Circuit Court of Appeals was entered June 15, 1945. [96]* Petition for writ of certiorari was filed July 13, 1945, and was granted October 22, 1945. [101] 66 S. Ct. 96, 172, 677.

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. [92-95] It is reported at 149 F. 2d 751.

Statute and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.5, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

* All figures in this brief appearing in brackets denote pages of the printed record.

Questions Presented

(1) Did Gibson's reporting at the civilian public service camp pursuant to order and his subsequent leaving it immediately after acceptance and examination constitute a waiver of his right to challenge the jurisdiction of the Selective Service System over him in his defense against the indictment based upon the administrative action?

(2) Does the Act deprive Gibson, charged by indictment with desertion from the civilian public service camp, of the same defenses that would be available to him if he had not reported at the camp, or the same rights that would have been available to him if he had remained at the camp and applied for a writ of habeas corpus?

(3) Did the courts below commit reversible error in holding that Gibson could not assert the want of jurisdiction of the draft boards and the illegality of the administrative orders supporting the authority of the civilian public service camp whose authority and orders he is charged by indictment with defying?

(4) Does the construction placed upon the Act and Regulations, so as to deny Gibson the right to challenge the jurisdiction of the draft boards and the legality of the orders supporting the authority of the civilian public service camp, deny Gibson his right to due process of law, contrary to the First Amendment to the United States Constitution, and a judicial trial, contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution?

(5) Did the trial court commit reversible error in excluding the proof offered by Gibson and in refusing the requested finding of fact which tendered the issue of Gibson's good faith and honest belief that he was exempt from training and service and that the civilian public service camp director had no jurisdiction to command him to remain at the camp?

(6) Did the trial court err in denying Gibson's motion to quash the indictment, motion for a finding of not guilty and for a judgment of acquittal, in excluding proffered evidence, and in denying requests for findings of fact and conclusions of law, all of which pertained to the illegality of the administrative order?

Form and History of Action

This criminal action was instituted in the District Court of the United States for the District of South Dakota by return of an indictment charging Gibson with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-4] The indictment charges that Gibson, on August 23, 1944, reported at a civilian public service camp at Hill City, South Dakota, and was enrolled there for work of national importance. It is further alleged that on August 28, 1944, he left said camp with the intention of remaining away. The indictment charges that such conduct constituted a violation of section 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. S. C. § 311). [2-3]

Before pleading to the indictment Gibson duly filed and presented his motion to quash the indictment. [8-15] It was overruled by the court. [19] Thereafter he pleaded "not guilty" on February 13, 1945. [29] A trial by jury was waived and the case was heard by United States District Judge A. Lee Wyman, for the District of South Dakota. [29] The trial without jury began on February 13, 1945. [29] At the close of all the evidence, Gibson moved for dismissal of the indictment, a judgment of acquittal and a finding of "not guilty", stating extensively his reasons. [15-19] On denial of that motion Gibson excepted. [20, 77-78] At the close of all the evidence he submitted to the court his requested findings and conclusions, all of which were refused and exceptions allowed. [78]

The court found petitioner guilty. [21-22, 23-24, 78] Petitioner excepted to the finding. [22-23] He was sentenced to five years and committed to the custody of the Attorney General in such place of confinement as may be designated. [24-25, 83] Petitioner served and filed his written notice of appeal. [25, 26, 27, 83] He timely filed his assignments of error which supported each ground of his appeal. In due course the cause was argued and submitted to the United States Circuit Court of Appeals for the Eighth Circuit. [96] The judgment of conviction was affirmed by that court June 15, 1945. [96, 97]

Facts

Gibson, now 24 years of age, registered under the Selective Training and Service Act of 1940 on June 30, 1942, with local board A of El Dorado, Arkansas. [30, 64] He was assigned order number 12064 with said board. [30] He timely filed, on October 12, 1942, a Selective Service Questionnaire answering questions required of him and in Series VIII thereof he made declaration pertaining to his status as a minister of religion. [30-31, 64]

In his questionnaire he stated:

'I have completed 8 years of elementary school and 1 year of high school. I have had the following schooling other than elementary and high school: Divinity school; course of study, Ministry; have attended a full two years and still attend.

'The job I am now working at is minister of religion. I do the following kind of work in my present job: Preaching the Kingdom of God for which Jesus taught his followers to pray (Matthew 6:10).

'I have also worked at the following occupations other than my present job, during the past 5 years: Farm laborer, farming from 1934 to 1940. My usual occupation, or the occupation for which I am best fitted, is ministry work.

'I prefer the following kind of work: Ministry work.

I would not consider accepting a job which would require me to move away from my present home.

'I am a minister of religion. I do customarily serve as a minister. I have been a minister of Jehovah's witnesses since June 1938. I have been formally ordained. My ordination was performed on September 9, 1938 by Brother Miller at Birmingham, Alabama. I am a student preparing for the ministry in a theological or divinity school. I am attending the Watchtower Bible and Tract Society, which was established before September 16, 1939, and is located at 117 Adams Street, Brooklyn, New York.' [30, 31, 64] (Government's Exhibit 1).

Gibson in his questionnaire claimed classification of IV-D, the classification given ministers of religion under Section 5 (d) of the Act. He showed that he devoted substantially full time to the performance of his work as a minister of religion. [30, 64]

The local board, on November 6, 1942, denied his claim for exemption and placed him in Class I-A, as liable for training and service in the armed forces. [30] He duly and timely appealed. [30] The board of appeal, on May 8, 1943, upon consideration of his draft board file, reversed the classification of the local board and placed Gibson in Class IV-E, thereby denying his claim for exemption from training and service as a minister of religion under Section 5 (d) of the Act and making him liable for service in a civilian public service camp as a conscientious objector. [30] (Government's Exhibit No. 1)

Gibson wrote to the State Director and requested him to appeal the determination to the President and to stay the induction process. [50-51, 69] The State Director did not take action. The National Director was requested to take action in behalf of petitioner by appealing the determination to the President. [50-51, 69] On a review of the case, the National Director refused to take an appeal. [69]

On May 23, 1944, Gibson was assigned to do work in a civilian public service camp. [30, 31] On or about September 1, 1943, Gibson was commanded to appear on September 22, 1943, for a preinduction physical examination. [51, 69] In 1944 he was again given such an examination and later notified by his local board that he had been found "physically fit" and accepted for 'civilian service'. [51-52, 69]

On August 8, 1944, the local board mailed to him an Order to Report for Work of National Importance, that commanded him to appear at the local board in Carlinville, Illinois, at 2 p.m. on August 21, 1944. [30, 31, 69] On that date he did appear at that local board and received his transportation to the camp in South Dakota. [30, 70] Thereupon he proceeded from the local board to the Civilian Public Service Camp at Hill City, South Dakota, where he remained until August 28, 1944, when he was given a physical examination. [30-31, 70]

On arrival at the camp Gibson found that the camp director and camp physician were away. [70] After staying at the camp three days without performing any work whatever, Gibson finally saw the camp physician upon his return. [70-71] He was examined and found physically acceptable. [70-71] He did not report to do work of national importance. [22, 30] The civilian public service camp reported that Gibson appeared at the camp to complete the administrative processes incident to induction. [33-34] (Petitioner's Exhibit A) The camp records also showed that Gibson was a missionary evangelist engaged in preaching the gospel of God's kingdom as a direct representative of the Watchtower Bible and Tract Society and that he was ordained in 1938 and had been engaged in the ministry work full time since 1940. [36] (Petitioner's Exhibit C) The report of the examining physician was received in evidence and showed that Gibson had been declared acceptable and found to be physically fit. [36] (Petitioner's Exhibit D)

After completion of the physical examination Gibson talked to the camp director immediately after arrival of the director at the camp. [33, 71] The first thing Gibson did was to hand to the camp director a typewritten letter reviewing the history of his work as a minister and the history of his efforts to obtain an exempt classification as a minister of religion from the draft boards. [33, 71] Gibson then told the camp director that he was in a covenant with Almighty God JEHOVAH to do His will by preaching the gospel of God's Kingdom, which must be proclaimed to all nations. He also informed the director that he did not ask the draft boards to give him a "conscientious objector" classification, but that the undisputed evidence in his draft board file showed he should have been given the exempt classification of IV-D which is given to all ministers of religion. [33-34, 71-72] Moreover, he pointed out that he had obeyed every order of the boards including their unlawful order to report to the camp. [70-71] He further informed the camp director that, as stated in the letter, he could not stay at the camp. [31-34, 71-72] The director told him that he would be prosecuted if he left the camp. [31-38, 74-75] Gibson replied that if he was it would not be the first time a Christian had been punished for following Christ Jesus; that Christ Jesus had been unlawfully charged, tried and convicted because of keeping His covenant with Jehovah God, as well as His apostles; that since Jesus' apostles refused to step aside from their preaching work and follow the command of the governments of their day, so also he (Gibson) as a Christian must follow in their footsteps. [74-75] He also pointed out to the director that he must obey God rather than the unlawful commands of the draft boards and the operators of the camp; that he stood in the same position of the three Hebrews who, when ordered to bow down and worship the golden image in ancient Babylon, firmly refused and for such refusal were thrown into the burning fiery furnace. [74-75] Gibson said that he would say, as

did the three faithful Hebrews, that if God sees fit to deliver him he will do so but that if God sees fit not to deliver him he, nevertheless, will continue to obey God regardless of the consequences. [74-75]

Before leaving, Gibson told the camp director that he had reported to the camp only to exhaust the administrative process in order to obtain correction of the illegal classification of the draft boards. [38-39] He then asked the director to give him a statement showing that he had reported in camp on August 23, 1944, and that after completing the administrative process, without performing any work, he left the camp voluntarily. [33-34] (Petitioner's Exhibit E) Upon receiving this statement from the director, Gibson left the camp. [33-34, 38-39]

Thereupon Gibson returned to his missionary field and resumed his evangelistic ministry in Indiana. He was arrested by an agent of the Federal Bureau of Investigation on December 2, 1944, under a charge of violating the Selective Training and Service Act of 1940. [44, 45-46, 65]

Gibson testified that he attended a divinity school, preparing to become a minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, a religious organization recognized by the Selective Service System, from 1935 to 1938. [61] That he had been a minister of that organization since 1938 and that he had been a full-time pioneer minister, devoting substantially his full time, since the fall of 1940. [61-62] That he was engaged primarily in carrying out his Christian duties as a minister of the gospel by engaging in evangelistic work of calling upon the people from house to house, locating people of good will toward Almighty God and the work of Jehovah's witnesses and in arranging for conduct of Bible studies in homes of the people interested in that work, and by public street preaching by distribution of literature containing Bible sermons, in Macon, Mississippi; El Dorado, Arkansas; Enid, Okla-

homa; Verdun, Illinois; and Clinton, Indiana. [59-66] That he also performed regular ministerial duties in connection with the congregation of Jehovah's witnesses located in El Dorado, Arkansas, where he each week delivered sermons and performed ministerial duties to that congregation as its minister and as assistant to the presiding elder of the congregation. [59-63, 64, 65-66]

How Issues Raised

By motion to quash, Gibson challenged the constitutionality of the criminal sanctions clause of the Act because if the only means of challenging the illegality of the action of the draft boards was by writ of habeas corpus, it deprived him of his constitutional rights of due process and converted the Act into a "bill of attainder" contrary to the Constitution. [9] Moreover, in the same motion he asserted that the Act and Regulations had been construed so as to require him to report in South Dakota to exhaust his administrative remedies, forcing him to stand trial in a strange, far-away district and State where the controversy did not arise, making it impossible for him to obtain compulsory subpoena powers over his witnesses, all of which was arbitrary, unjust, unreasonable and depriving him of his rights and liberty without due process of law, contrary to the Fifth Amendment to the United States Constitution. [8-11] The motion to quash was overruled, to which Gibson excepted. [19, 29]

Although the trial court allowed the Government to introduce into evidence the questionnaire, documentary evidence attached to it by Gibson was excluded from evidence. [31, 48-52] All material and relevant documents filed in Gibson's Cover Sheet with the draft board that were considered by the administrative agency in arriving at his final classification, whereby he was denied his exemption from duty as a minister of religion, were identified and offered

in evidence. [48-52, 52-56] These various documents were excluded from the evidence by the trial court despite the fact that they were offered to show that the order on which the indictment was based was illegal, arbitrary and capricious, *ultra vires*, without jurisdiction, contrary to law, without support of any substantial evidence, contrary to the undisputed evidence, and contrary to the due process clause of the Fifth Amendment. [48-56] Exception was duly taken to the action of the trial court in excluding this documentary evidence. [56-57] Gibson requested the court to try the issue of his exemption from duty and want of authority of the draft board *de novo*. [47-48, 57-58, 66-68] He offered his own testimony, as well as that of another witness. [57-58, 66-68] By the *de novo* evidence thus offered he attempted to prove that he performed his work as a minister of religion without commercial gain; that he was an ordained minister of religion; that he stood in relation to congregations of Jehovah's witnesses as do ministers of the popular orthodox religious denominations. [57-58, 66-68] Moreover, he offered to show *de novo* that he regularly performed duties and ceremonies like those ordinarily performed by ministers of the orthodox religions, such as baptismal, memorial, burial, and other ceremonies usually performed only by ministers of religion. [57-58, 66-68] Additionally, he offered to show that he was recognized by others of Jehovah's witnesses and by other persons not Jehovah's witnesses as standing in the same relation to the Watchtower Bible and Tract Society and Jehovah's witnesses as do the regular and ordained ministers of orthodox religions. [57-58, 66-68] This evidence offered for the purpose of review *de novo* was excluded by the trial court, to which exception was duly taken and allowed. [59, 69]

Gibson duly urged his motion for dismissal of the indictment and for judgment of acquittal at the close of all the evidence. [15-19, 77-78] The grounds of the motion were that the undisputed evidence showed that the draft board

order was void because the administrative agency had acted contrary to the Act, the Regulations and the due process clause of the Fifth Amendment in ordering Gibson to report for work of national importance. Additional grounds were urged. [15-19] The motion was denied, to which exception was allowed. [20]

Gibson duly requested findings of fact and conclusions of law urging the court to find that the administrative order on which the indictment was based was illegal and void. [78] These requests were overruled, to which exceptions were allowed. [78] To the formal finding of guilty and written findings of fact made by the trial court Gibson duly objected and excepted. [22-23]

Specifications of Error

Gibson relies upon every one of his assignments of error duly filed in the trial court as grounds for reversal of the judgment of conviction.

[Points for JOINT ARGUMENT of *Gibson* and *Dodez* cases appear at pages 28-29, *infra*.]

Statement of Dodez Case

Jurisdiction

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934. The judgment of the Circuit Court of Appeals was entered March 18, 1946. [189]

Petition for writ of certiorari was granted on May 6, 1946. 66 S. Ct. 1017.

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. [189-200] It is reported at 154 F. 2d 637.

Statute and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.5, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

(1) Does acceptance upon preinduction physical examination of one classified as a conscientious objector constitute completion of the selective process and exhaustion of administrative remedies so as to qualify Dodez to challenge the legality of the administrative action in defense to an indictment charging him with failure to report for work of national importance in a civilian public service camp?

(2) Did the courts below err in holding that the rule of *Falbo* v. *United States* (320 U. S. 549) applied and that the rule of *Estep* v. *United States* (66 S. Ct. 423) did not control?

(3) Did the trial court err in refusing to allow Dodez the right to show, and in refusing the jury the right to consider that the order on which the indictment was based is void because Dodez is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving Dodez of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(4) Did the trial err in holding that it and the jury could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided to whether or not Dodez knowingly failed to report for work of national importance?

(5) Does the construction placed upon the Act and Regulations by the courts below, requiring Dodez to report at a civilian public service camp for work of national importance as a condition precedent to judicial review of the illegality and unconstitutionality of the action of the

Selective Service System, violate Clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(6) Did the trial court err in denying Dodez' motion to quash the indictment, motion for an instructed verdict and for a judgment of acquittal, in excluding proffered evidence, in denying requests for charges and in charging the jury, all of which pertained to the illegality of the administrative order?

Form and History of Action

This criminal action was instituted by indictment returned against Dodez charging him with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-3]

The indictment charged that Dodez, a registrant classified as a conscientious objector, "did knowingly, willfully, unlawfully and feloniously, fail to perform such duty required of him; that is to say, that the said defendant, did fail to report for work of national importance as ordered by said Board". [3]

Thereafter Dodez pleaded "not guilty". [3] He filed a motion to quash the indictment on the grounds that the construction placed upon the criminal sanctions clause so as to deny him his right to show, in defense to the indictment, that the orders of the Selective Service System were void and illegal, violated the Constitution of the United States. [35] The motion to quash was overruled, after argument to the court, on December 7, 1944. [9] The trial to a jury before the court began on December 7, 1944. [9] The court excluded and received evidence upon the trial. The case closed when all the evidence was in on December 7, 1944. [3, 67] At the close of the evidence, Dodez moved for dismissal of the indictment and for a judgment of acquittal [6-8, 16, 65, 127-130] and for a directed verdict of not guilty. [6-8, 16, 65, 127-130] In these motions the

reasons were stated extensively. [6-8] The motions were denied with exceptions to Dodez. [16, 65] Dodez duly submitted to the court, before argument of counsel to the jury, his requested instruction to the jury. [66-101]

On December 8, 1944, the cause was argued to the jury by counsel. [60-104] Thereupon the court charged the jury. [104-108] The court refused all of Dodez' requested charges to the jury and allowed exceptions to his ruling. [109] Dodez duly objected and excepted to the court's charge. [109-111] The jury retired to consider the verdict at 2:00 p.m. [12] The jury rendered its verdict of guilty on December 8, 1944, at 3:00 p.m. [112, 127] On December 15, 1944, the United States District Judge rendered judgment upon the verdict and sentenced Dodez, committing him to the custody of the Attorney General for a period of five years. [121, 130-131]

Dodez duly served and filed his written notice of appeal in the time and manner required by law. [132] He timely filed his assignments of error which support each ground of this petition. [135-142] In due course the case was argued and submitted to the United States Circuit Court of Appeals for the Sixth Circuit. The judgment of conviction was affirmed by that court on March 18, 1946. [189]

Facts

Dodez registered pursuant to the Selective Training and Service Act on June 30, 1942. [156] On September 21, 1942, he filed his Selective Service Questionnaire. [146] He showed his occupation to be that of a duly ordained minister of religion since January 1941. [17, 146-148] In his questionnaire he asserted: "In view of the facts set forth in this Questionnaire it is my opinion that my classification should be 4D." [18, 148] He filed with his questionnaire certificates of ordination showing that he was recog-

nized by the Watchtower Society, the legal governing body of Jehovah's witnesses, as an ordained minister of the gospel. [157-159] Affidavits were also filed showing that Dodez' full time was devoted to the regular performance of his duties as a minister of religion and that he stood in relation to the congregation of Jehovah's witnesses as do the ministers of orthodox denominations. [159-165] On November 25, 1942, the local board classified him in Class I-A, sending him notice thereof on November 30, 1942. [150] Thereafter, on December 3, 1942, he requested a personal appearance before the local board pursuant to the Regulations. [167-168] On December 7, 1942, he appeared before the local board and submitted a petition signed by forty-four persons stating that they recognized him as a minister of Jehovah's witnesses and the Watchtower Society and that he regularly preached and taught the principles of Jehovah's witnesses. [168-169] At such personal appearance the local board denied him a full hearing but evidence of the denial was excluded from the record. An offer of proof was made. [33-36] He was continued in Class I-A on December 7, 1942, notice thereof being mailed to him on December 8, 1942. [150] Dodez thereafter requested a rehearing for the opportunity to present additional evidence. This proof was rejected by the court [36-37]

He appealed to the board of appeal on December 17, 1942. [149] In his notice of appeal he complained of the failure of the local board to give him a full and fair hearing. He also complained of the refusal of the local board to grant him a rehearing in order to enable him to offer additional evidence. [170] He accused the local board of being prejudiced, unfair and capricious. [171] Pending the determination of his appeal, he notified the local board that he had been appointed as the presiding minister of the congregation of Jehovah's witnesses at Wooster, Ohio. [172-173]

On June 11, 1943, he was notified that the board of appeal had reclassified him to Class IV-E, [150] which made him liable to do work of national importance in a civilian public service camp. Thereafter he attempted to have his case reopened. In dealing with the Government Appeal Agent and members of the local board, there were statements made about prejudice on the part of the local board. However, evidence as to this was excluded by the court. It is shown in an offer of proof. [37-44]

Additional evidence was submitted and request again made to have his classification reopened in January 1944. Such evidence consisted of an affidavit and petition stating that Dodez regularly and customarily served as and performed the duties of a duly ordained minister and presiding minister over the congregation of Jehovah's witnesses, teaching and preaching the beliefs of Jehovah's witnesses, and certifying that he was authorized to perform marriages, baptism, funeral and other ceremonies generally performed by ordained ministers. [174] The signers of the petition alleged that it would result in a hardship to them if petitioner was taken away from the congregation. [174-176] With this was submitted a certificate issued May 18, 1943, by the State of Ohio, licensing Dodez to solemnize marriages within the State of Ohio as long as he continued as a minister of the Watchtower Society. [176] This additional proof was accompanied by a letter to the local board. [179-180] The local board declined to reopen his classification.

On February 10, 1944, Dodez was mailed an Order to Report Preinduction Physical Examination directing him to appear at the local board located at 243 West Market Street, Orrville, Ohio, on February 21, 1944. [182-183] He appeared as directed and was thereafter given preinduction physical examination at the induction station on February 21, 1944. [150, 184-186] Certificate of Fitness was thereafter sent to Dodez on February 28, 1944. [150, 184-185] It certified that Dodez, after having been examined

upon a preinduction physical examination, had been declared "Physically fit, acceptable by Army for general military service". [51-52, 184-195] The report of Physical Examination, dated February 21, 1944, appears in the Record. [185-186]

On April 8, 1944, Dodez was ordered to report for work of national importance. [150, 155-156] The order recited that he had been assigned to C. P. S. Camp No. 28, at Medaryville, Indiana. It commanded him to appear at his local board at 5 a.m. on April 21, 1944. [150, 155] On April 19, 1944, Dodez, by letter, acknowledged receipt of the Order to Report for Work of National Importance. [186-187] He reviewed the illegality of the action of the administrative agency and, for the reasons stated in his letter, declared that he would not report because he could not turn aside from and quit his preaching occupation that he was bound to perform in accordance with the covenant made with Almighty God. [186-187] Dodez failed to report at the local board, as commanded, to do work of national importance. [14-15, 150]

How Issues Raised

By motion to quash the indictment Dodez claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and orders based thereon. [35] He asserted that if the Act and Regulations were so construed as to deny him these defenses, they were unconstitutional because a Bill of Attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution; because they surrendered the judicial power to the draft boards contrary to Article III of the Constitution; because they denied the right to a judicial trial contrary to the due process clause of the Fifth Amendment to the United States Constitution, because they deprived him of his right of trial by jury contrary to the

Sixth Amendment to the United States Constitution. [35] The trial court overruled the motion to quash with exception to Dodez. [9, 10]

The trial court erroneously excluded from evidence, over the objection of Dodez, his own testimony offered *de novo* to show his activity as an ordained minister. This testimony was offered for the purpose of showing that Dodez was exempt from all training and service under the Selective Training and Service Act. [30-32]

The trial court erroneously excluded from evidence, over the objection of Dodez, testimony tending to show prejudice and discrimination by the local board against him, and evidence tending to show that the members of the local board had denied him a full and fair hearing before that board. [33-35, 36-44]

The trial court erroneously excluded from evidence, over the objection of Dodez, testimony offered *de novo* by him to establish his background and training for the ministry. [50-51]

At the close of the evidence Dodez moved for a dismissal of the indictment [127-128] and for a directed verdict [128-130] on the grounds that the undisputed evidence showed that the draft board order was void because the board acted in excess of its authority in that Dodez was a minister of religion exempt from all training and service and was not liable for training and service under the Act; that he had exhausted his administrative remedies and was in a position to challenge the action of the administrative agency and the orders on which the indictment was based; that the board had denied him his rights of procedural due process by rejecting the evidence and that the court had construed the Act and Regulations so as to require him to report for work of national importance at a CPS camp as a condition precedent to a judicial review, which denies him the right of a judicial trial contrary to the Constitution

of the United States. [127-130] Each motion was denied with exception to Dodez. [65]

Dodez duly tendered to the court requested charges to the jury. [67-100] The requested charges defined what constituted a regular or duly ordained minister of religion, stated the duties of draft boards in considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. The court was requested to charge the jury that if they concluded and found that the undisputed evidence before the draft boards showed that Dodez was a minister of religion and of Jehovah's witnesses and there was no substantial evidence that he was not such a minister as claimed, that they could acquit him, by their verdict saying he was not guilty. The court was requested to charge the jury that if they found that the boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations and arbitrarily or capriciously, they could render a verdict of not guilty. [67-100] These requests were each refused separately and exception allowed to each refusal. [66-67, 109]

The court instructed the jury that the only issue to be determined was whether or not Dodez reported for work of national importance, and if the evidence showed that Dodez failed to so report, it would be the duty of the jury to find him guilty. [104-108] Dodez objected and excepted to the court's charge on the grounds that he was thereby denied the right to urge in defense to the indictment that he was exempt from training and service as a minister of religion; that the court instructed the jury to convict him; that the instruction of the court denied him his right to a judicial trial and a trial by jury, and abridged his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution. [109-111]

Throughout the trial, from beginning to end, the court held that the actions of the draft boards were binding upon Dodez, the court and the jury, and that Dodez could not challenge the same on any ground, or that his failure to report for work of national importance was not a willful violation of the Act.

Specification of Errors

Dodez relies upon every one of his assignments of error as grounds for a reversal of the conviction. [135-142]

Summary of Joint Argument

Petitioners were classified as conscientious objectors making them liable for training and service in civilian public service camps. Each was ordered to report at an army induction station for the preinduction physical examination to determine his acceptability prior to assignment to a civilian public service camp. Each was found physically fit and acceptable for training and service.

The acceptance for training and service constituted a completion of the selective process. At this point each petitioner had exhausted the administrative remedies sufficiently to entitle him to challenge the illegality of the administrative action in denying the claim for exemption as a minister of religion. This proposition is conceded by the Government. This concession makes applicable the rule of *Estep* v. *United States,* 66 S. Ct. 423, requiring a reversal of the judgment in the *Dodez* case.

Under the circumstance of the Government's concession (the identical position taken by Nick Falbo upon oral argument in this Court which was emphatically urged in his Second Petition for Rehearing) and since the terms of the Regulations involved in the *Dodez* case are substantially the same as the terms of the Regulations as they existed

at the time Falbo was ordered to report for work of national importance, the *Dodez* case presents to this Court AGAIN the necessity of reconsidering this Court's decision in *Falbo* v. *United States,* 320 U. S. 549. The facts and Regulations in the *Dodez* case require the Court to reverse the position taken in *Falbo* v. *United States, supra.* Petitioners now urge upon the Court to reconsider and declare to be erroneous the decision reached in *Falbo* v. *United States, supra.*

The Court inadvertently misapprehended the Selective Service Regulations in reaching the decision that it reached in the *Falbo* case when it held that the selective process was not completed until the assignee reported at the civilian public service camp for a physical examination where he might be rejected. The Regulations nowhere provided for the physical examination of all registrants reporting at the civilian public service camp. Moreover, the Regulations at that time provided for a final-type physical examination at the army induction station, which is identical with the preinduction physical examination given registrants classified as conscientious objectors at army induction stations under the present Regulations.

If as is conceded, acceptance upon the preinduction physical examination terminates the selective process and constitutes an exhaustion of the administrative remedies under the present Regulations, then by force of the same reason the identical final-type physical examination of the same class of registrants under the Regulations as they existed at the time Falbo was ordered to report for work of national importance should be held to constitute the exhaustion of administrative remedies.

The obvious misapprehension of the Regulations by the Court in the *Falbo* case was due to the equivocation of the Government and its presentation, as to when the administrative remedies were exhausted, in misleading light

upon the oral argument of that case and in its brief. The vigorous argument made by the Government's counsel in his brief and upon oral argument that it was necessary to submit to induction and apply for a writ of habeas corpus, as the only remedy, was a mere decoy whereby the Court was lured into the position it got into in the *Falbo* decision, which was a "trap" for the Court as well as for Falbo.[1] Moreover, in its brief it was stated, "the camp physician shall examine him and he may thereupon be rejected, in which event the local board must classify him IV-F (Reg. 653.11). Thus, as of October 15, 1943, of the 8,000 registrants who had reported at such camps, 610, or approximately 7 percent, were rejected." (Brief for the United States, *Falbo* v. *United States,* No. 73 October Term 1943, p. 56)[2]

The Government argues that Gibson went too far when he reported at the civilian public service camp for the purpose of exhausting his administrative remedies. Gibson was following the advice of this Court which was implicit in the Court's opinion in the *Falbo* case. Since the Regulations in the *Falbo* case *were about the same* as they were at the time Gibson was ordered to report for work of national importance, Gibson could reasonably conclude that the doctrine of the *Falbo* case required him to report at the civil-

[1] It is too late to extricate Falbo from the trap; but, it is not too late for the Court to get out of the trap by correcting its erroneous decision. See Petitioner's Petition for Rehearing, *Falbo* v. *United States,* No. 73 October Term, 1943, p. 2, 84-85. It is never too late to be right.

[2] It should be observed that the Regulation referred to does not even provide for rejection of assignee-registrants whatever. That Regulation provides for an examination of only those registrants who indicated a change in physical condition: "*If* the assignee *indicates* that *his physical condition has changed* since his final type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the camp director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized where necessary." (Emphasis added) Reg. 653.11 (e); Brief for the United States, *Falbo* v. *United States,* No. 73 October Term 1943, pp. 113-114.

ian public service camp to undergo the physical examination.

While there have been some slight changes in Section 653.11 of the Regulations, they are not material in determining whether Gibson waived his right to challenge the legality of the administrative action by going further than reporting for preinduction physical examination. He did not intelligently and knowingly waive his rights. In good faith he attempted to pursue his remedies to the end. His going to the point of undergoing a physical examination following his acceptance by the civilian public service camp nevertheless still did not confer jurisdiction upon the local board that exceeded its authority in ordering him to report for work of national importance, because the undisputed evidence showed that he was exempt by statute from all training and service. The local board did not have jurisdiction. The civilian public service camp could not assume jurisdiction.

Gibson's leaving the camp after undergoing the physical examination by the camp physician did not constitute a separate and distinct offense under the Act which allows no challenge of the want of jurisdiction of the administrative agency over him. If he could challenge the jurisdiction of the agency at the time he exhausted his administrative remedies when he was accepted on the preinduction physical examination, or if he could challenge the jurisdiction of the agency by applying for writ of *habeas corpus*, after remaining at the camp as ordered, then by force of the same reason, he should be able to challenge the want of jurisdiction of the agency in defense to the indictment charging him with violating the Act by failing to remain at the camp after being ordered to report by the administrative agency.

By leaving the civilian public service camp, Gibson in no way waived any of his rights to challenge the want of

jurisdiction on the part of the administrative agency (1) that classified him, (2) that ordered him to report at the said camp, (3) that operated the said camp and (4) that commanded him to remain at the said camp. At all times—from the time of his registration to the time of his departure from the civilian public service camp—he was under the direction and control of the Selective Service System, which operated the camp.

In event that this Court should hold that Gibson went too far and that he waived his rights thereby, then the Court should declare that he was entitled to assert his honest good-faith belief that he was exempt as a minister of religion in defense to the indictment, and hold that the trial court erred in excluding the evidence offered by Gibson on that issue and in refusing his request for finding of fact presenting the issue as a defense against the indictment.

[Points for JOINT ARGUMENT of *Gibson* and *Dodez* cases appear at pages 28-29, *infra.*]

Points for Joint Argument

ONE

Petitioners' acceptance because of physical and mental fitness upon a preinduction physical examination terminated the selective process and exhausted their administrative remedies before the orders to report for work of national importance were issued entitling them to show in response to the indictments that the draft boards exceeded their jurisdiction in denying their claims for exemption from training and service as ministers of religion.

TWO

Gibson's reporting at the civilian public service camp as ordered and leaving it immediately after acceptance and physical examination did not constitute a waiver of his right to challenge the jurisdiction of the Selective Service System in his defense against the indictment.

THREE

The construction placed upon the Act and Regulations by the courts below denies petitioners their right to challenge the jurisdiction of the draft boards and the legality of the orders supporting the authority of the civilian public service camps in violation of due process of law, contrary to the Fifth Amendment to the United States Constitution, and denies them a judicial trial contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution.

FOUR

The holdings of the courts below that petitioners could not challenge the jurisdiction of the draft boards in their trials because they had not resorted to the remedy of *habeas corpus*, were fundamental errors requiring reversal of convictions.

FIVE

The trial court committed reversible error in excluding the proof offered by Gibson, and in refusing the requested finding of fact and conclusion of law tendering the issue of Gibson's good faith and honest belief that he was exempt from training and service and that the civilian public service camp director had no jurisdiction to command him to remain at the camp.

JOINT ARGUMENT

ONE

Petitioners' acceptance because of physical and mental fitness upon a preinduction physical examination terminated the selective process and exhausted their administrative remedies before the orders to report for work of national importance were issued entitling them to show in response to the indictments that the draft boards exceeded their jurisdiction in denying their claims for exemption from training and service as ministers of religion.

The Selective Training and Service Act of 1940 (§3a) in part provides: " . . . no man shall be inducted . . . until he is *acceptable* to the land or naval forces . . . and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added). The administrative process beginning "with registration with the local boards" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp." *Falbo* v. *United States*, 320 U. S. 549.

Section 629.1 of the Regulations provides that every registrant must be given a preinduction physical examination, which is a final-type physical examination for registrants classified as conscientious objectors (Reg. 651.1-651.8). If the conscientious objector is found physically fit, he is then assigned by the National Director of Selective Service to a designated civilian public service camp (Reg. 651.10, 652.1, 652.2). Pursuant to such assignment, the local board issues the order to report for work of national importance. After the conscientious objector has been given a preinduction physical examination and has been assigned

to a particular camp by the National Director, the local board then orders him to report at the board for transportation to the civilian public service camp to which he is assigned (Reg. 652.11). The Regulations provide that after arrival at the camp the registrant shall be examined to ascertain whether there has been a change in his physical or mental condition. But irrespective of the result of the physical examination he is accepted by the camp for work of national importance (Reg. 653.11). He cannot be rejected at the camp. If a change in his condition is found, he is hospitalized. The Regulations provide that the acceptance shall be noted after the physical examination. The camp director is required to place on the form a statement that the registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director (Reg. 653.11).

Acceptance of one classified as a conscientious objector upon a preinduction physical examination ends the selective process, before the order to report for work of national importance issues. For such work each petitioner was ordered to report. Each had been accepted upon the preinduction physical examination which terminated the selective process and exhausted the administrative remedies before he was ordered to report for work of national importance.

In *Billings* v. *Truesdell*, 321 U. S. 542, by a construction of the Regulations and the Act, it was ruled that at this point in the proceedings a registrant, when found physically and mentally fit, was to be deemed "acceptable" and is "accepted". The very next step, induction, or submission to work of national importance, was not and is not a part of the *selective process*. Unmistakably, the court pointed out in the *Billings* decision, that the *Falbo* decision was not to be construed as holding that a man must submit to in-

duction before he could be said to have exhausted his administrative remedies, but that the *selective process* ended when he was accepted and that thereafter he could refuse to submit to induction:

"But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Process to more severe penalties than those who stayed away in defiance of the board's order to report."

The foregoing quoted portion of the *Billings* opinion is a forcible demonstration of the misapprehension by the courts below of the Regulations governing petitioners' acceptance and assignment to civilian public service camp. The court of appeals in the *Dodez* case said that "after reviewing *Estep* and *Smith* cases in detail and noting that no attempt is made therein to reverse *Falbo* v. *United States* (supra), we conclude that the *Falbo* and not the *Estep* and *Smith* decisions apply here. We believe the cases are identical since neither Falbo nor Dodez had exhausted his administrative remedies by reporting for *induction*. In the case at bar had draftee so reported and then refused to be *inducted*, the *Estep* and *Smith* decisions would have been controlling." (Emphasis added) [193-194]

It should be observed that it was impossible for petitioners to be inducted at the civilian public service camp. Indeed, there is no induction ceremony at the camp. There is no line drawn in the Regulations whereby a point is fixed permitting the registrant to choose between induction and refusal to be inducted with prosecution under the Act, as in the case of registrants ordered to do training and service in the armed forces. In the case of registrants classified as conscientious objectors, the Regulations provide that the registrant is under the jurisdiction of the

camp to which he is assigned after leaving the local board where he has reported in pursuance to the order commanding him to do work of national importance. (Reg. 652.13) It is manifest that the courts below confused the distinction between the well defined procedure of registrants ordered to do work of national importance and registrants ordered to do training and service in the armed forces. The fact that one classified in I-A may be said not to exhaust his remedies until he has undergone the final physical examination at the induction station given by the armed forces upon his reporting pursuant to an order to report for induction, cannot be taken as a guide for determination that a registrant classified in IV-E has not exhausted his remedies until he has reported at the civilian public service camp. Since it is impossible for a registrant to be rejected at the civilian public service camp, and inasmuch as there is no physical examination given at said camp for the purpose of determining the acceptability of the registrant, it is unnecessary for one classified as a conscientious objector to report to the local board or to the CPS camp in response to an order to report for work of national importance in order to exhaust his administrative remedies. Indeed the remedies have been exhausted upon the taking of the preinduction physical examination long before the order to report for work of national importance is issued.

When each petitioner was found physically fit and acceptable for general military service upon his preinduction physical examination at the induction station *he was acceptable* for work of national importance under civilian direction. This acceptance was before the orders to report to the camp had issued. Each had been officially and finally *accepted*, as indicated by the subsequent notice to report to camp, sent by the Director of Selective Service who is in charge of the CPS camps. (Reg. 653) Thus each petitioner exhausted his administrative remedies and, under

the rules set forth in the *Falbo* opinion itself as amended and clarified by the *Billings* opinion, he was then in a position to urge the illegality of his classification as a defense against the indictment.

In the *Billings* opinion (*supra*) it was said that the fact that one may have been accepted several weeks before he was ordered to report for induction would not alter the case. The fact that each petitioner may have been accepted several weeks before he was ordered to report for work of national importance did not change the fact that he was actually accepted for work of national importance in a CPS camp. The final irrepealable order of General Hershey assigning him to do work of national importance had been theretofore issued. In *Billings* v. *Truesdell, supra,* it is said: "It is difficult to see why there would be a difference in result if the interval between the time when he is found acceptable or is accepted and the ceremony of induction were only a few minutes, as in the present case, rather than a few weeks." It is only administrative remedies that one is required to exhaust in order to qualify himself for judicial review.

No administrative remedy was available to petitioners upon reporting to the camps. Dodez could not have been discharged at the camp. His acceptance on reporting at the camp, had he reported, would have been mandatory. This is demonstrated in the case of Gibson. Gibson reported at the camp, was accepted at the camp when the camp director completed the "Order to Report for Work of National Importance" and the "Report of Physical Examination and Induction".* The fact that Gibson was commanded to re-

* The parties hereto have stipulated that Gibson was accepted at the camp on August 23, 1944, when he reported there. The stipulation has been filed with the Clerk of this Court. This should make unnecessary a discussion of this question upon the oral argument, which the Court indicated in its order that it desired discussed by counsel on reargument.

main at the camp shows that he had no remedies available to him at the camp.

Section 652.13 of the Regulations provides that the registrant is under the jurisdiction of the camp after leaving his board, following his reporting at the board to be transported to the camp. Section 653.11 (a) requires the director, on arrival of the registrant at the camp, to fill out the order to report for work of national importance. Section 653.11 (c) of the Regulations declares that acceptance at the camp is completed by filling out the order to report. Section 653.11 (b) provides for a cursory physical examination, but inasmuch as Section 653.11 (c) provides that acceptance shall be made irrespective of the physical examination, it is impossible for a registrant to be rejected at the camp.

It would be a hollow formalism to hold that it was necessary for petitioners to report for work of national importance and to appear at the camps for the mere purpose of having the camp directors fill out forms showing that they had been accepted, when they had been previously accepted upon the preinduction physical examination which exhausted the administrative remedies, and when there was no possibility for petitioners to get any relief by being rejected. Indeed, Section 653.12 of the Regulations makes it a mandatory duty for a registrant to remain at the camp after reporting there.

In view of the position which is here taken as to when the administrative remedies are exhausted, in which the Government concurs, it is highly necessary to call upon this Court to reconsider and overrule its decision in *Falbo* v. *United States*, 320 U. S. 549. If Dodez and Gibson had completed the selective process when they were accepted upon the preinduction physical examination so as to exhaust the administrative remedies, then Falbo had also completed the selective process and had exhausted his administrative remedies when he was accepted by the armed

forces upon his final-type (preinduction) physical examination. The Regulations with respect to acceptance and assignment to a civilian public service camp, following a preinduction physical examination, are identical with the Regulations about acceptance and assignment following the final-type physical examination that were considered in the *Falbo* case. If the administrative remedies have been exhausted in the *Dodez* and *Gibson* cases, they were also exhausted in the *Falbo* case. If Dodez and Gibson are entitled to challenge the jurisdiction of the administrative ageney, then Falbo was qualified to challenge the jurisdiction of the administrative agency in response to the indictment under which he was convicted in his case.

At the time Falbo was ordered to report for work of national importance, Section 651.2 of the Regulations provided for the issuance of an Order to Report for Final-type Physical Examination to registrants classified in Class IV-E. Section 629.2 (c) of the Regulations now provides that a IV-E registrant shall be ordered "to report for preinduction physical examination under the provisions of paragraph (b) of this section."

The Regulations at the time Falbo was ordered to report provided for registrants placed in Class IV-E to report to the army induction station for a final-type physical examination, "along with the selected men who are being delivered to the induction station". Reg. 651.7 (b). Section 629.21 of the present Regulations provides that "When the local board mails to a registrant an Order to Report —Preinduction Physical Examination (Form 215), it shall be the duty of the registrant to report for such examination at the time and placed fixed in such order".

The Regulations at the time Falbo was ordered to report provided for a final-type physical examination at the induction station identical with the present preinduction physical examination. (Reg. 651.8) The present preinduc-

tion physical examination provided for in the Regulations is in every respect the same as the final-type physical examination given to Falbo. (Reg. 629.2)

After a registrant Classified IV-E was given the final-type physical examination at the time Falbo was ordered to report, a Report of Physical Examination and Induction was returned to the local board by the induction station commander, which showed that the registrant was qualified or disqualified for service. (Reg. 651.9) Under the present Regulations after each IV-E registrant has undergone the preinduction physical examination, the commanding officer returns to the local board the Report of Physical Examination and Induction showing whether or not the registrant is physically or mentally acceptable for training and service. (Reg. 629.31)

At the time Falbo was ordered to report, the Regulations provided that "When a registrant in Class IV-E has been found to be acceptable for work of national importance" upon the final-type physical examination, the local board was required to notify the Director of Selective Service that the registrant was "so acceptable" and "available for assignment to work of national importance under civilian direction." (Reg. 652.1 (a)) The Regulations at the present time provide that after the IV-E registrant has been accepted upon the preinduction physical examination the local board shall notify the Director of Selective Service that "the registrant is available for assignment to work of national importance under civilian direction." Reg. 652.1(a).

The Regulations at the time Falbo was ordered to report, with respect to *assignment* of a registrant classified IV-E to do work of national importance in a civilian public service camp designated by the Director of Selective Service, are identically the same in every respect with the present Regulations.

At the time Falbo was ordered to report, the Regulations with respect to the preparation and mailing of the Order to Report for Work of National Importance are substantially the same as the present Regulations on that subject. (Reg. 652.11)

Since taking of the preinduction physical examination now terminates the selective process of IV-E registrants, it must be conceded that the taking of the final-type physical examination by Falbo—which is identical to the preinduction physical examination—exhausted his administrative remedies and he was also in a position to challenge the administrative order as a defense in response to the indictment. There was no other remedy available which can be considered an administrative remedy for the purpose of complying with the doctrine of exhaustion of administrative remedies. Such further step of reporting needed not be complied with by him as a condition precedent to judicial review. *Utley* v. *St. Petersburg,* 292 U. S. 106; *Kansas City S. Ry.* v. *Ogden Levee Dist.* (CCA-8) 15 F. 2d 637. See also *Gonzales* v. *Williams,* 192 U. S. 1, 15, where, with reference to an argument about exhausting administrative remedies, the court said: "She was not obliged to resort to the superintendent or the secretary."

The Government argues that when Gibson and Dodez were ordered to report the reception of a conscientious objector at the civilian public service camp differed from that which prevailed at the time that Falbo was ordered to report. The Government says that at such time it was possible for a registrant to be rejected upon an examination at the camp. As a basis for this contention, rather than citing or quoting the Regulations as they existed at the time Falbo was ordered to report, the Government relies upon a portion of the language of this Court's opinion in *Falbo* v. *United States, supra,* which was the result of the Government's unfair presentation of the law in that case. The language is: "The selectee may still be rejected at the in-

duction center and the conscientious objector who is opposed to noncombatant duty *may be rejected at the civilian public service camp.*" (Emphasis added) 320 U. S. at p. 553.

The Regulations at the time Falbo was ordered to report for work of national importance did not provide for the rejection of an assignee found to be physically fit. The Regulations provided that "*If* the assignee indicates that his *physical condition* has *changed since* his final-type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the camp director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized where necessary." (Emphasis added) Reg. 653.11 (c); Brief for the United States, *Falbo* v. *United States,* No. 73 October Term 1943, pp. 113-114.

It is manifest that the Court, in the *Falbo* case, misapprehended the effect of this Regulation. To begin with, the examination provided for in the Regulation on its face is contingent upon a change in the physical condition. Unless the registrant indicated that there had been a change in his physical examination since the final-type physical examination, there was no opportunity for the camp physician to examine him, because his acceptability had been predetermined upon the final-type examination. (Reg. 653.11 (c)) Therefore when this Court held that it was possible for the conscientious objector to be rejected at the civilian public service camp as an administrative remedy it violently assumed that there would be a change in the physical condition of every selectee warranting another examination.

Certainly the exhaustion of administrative remedies does not depend upon the vagaries of a man's physical condition. Once a condition is proven, it is presumed to continue to exist. Of course, a registrant could be struck by lightning, develop galloping tuberculosis or have an acci-

dent and otherwise become unfit for service from the time he was accepted upon the final-type examination until the time he reported at the camp. But certainly the uncertain right to a physical examination in any one of such vague and indefinite contingencies cannot be urged or asserted as constituting an *administrative* remedy. Therefore, when this Court held that there was an opportunity for every assignee to be re-examined at the camp as an administrative remedy it erred.

Regulation 653.11 (c) provided that, upon such physical examination, which was given only in the event the registrant indicated a change in his physical condition, the assignee thus reporting physical defects may not be accepted for work of national importance. (Reg. 653.11 (c)) However, that Regulation specifically failed to provide for a rejection of the assignee from camp. The Regulation specifically provided that "the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized, where necessary." (Reg. 653.11 (c))

The provision in the Regulations, at the time that Falbo was ordered to report, for the right to have a physical examination upon reporting at the camp, in the event only that the registrant indicated a change in his physical condition, certainly cannot be said to constitute an *administrative remedy* available to every registrant ordered to report for work of national importance. If so, then the Court would have to impute that every registrant classified in IV-E probably would have a "break-down" in his physical condition from the time he was given the final-type physical examination to the date he reported at the camp, though it might be a period of only a matter of days or weeks.

The administrative remedy provided in the Regulations for the examination of only registrants who, upon reporting at the camp, indicated a change in physical condi-

tion, is nothing more than a provision (similar to the familiar rule in administrative law) for a motion for rehearing where there has been a change in the circumstances or facts after the date of the original administrative decision. In other words, the provision for an examination at the camp was nothing more than an optional "rehearing" or optional "reexamination" because of the change in the physical condition subsequent to the final-type examination.

This Court has unanimously held that where there is an optional rehearing available to a party in administrative law, it is not necessary for him to resort to exercise of his option of filing a motion for rehearing as a condition to judicial review of an administrative determination. *Levers* v. *Anderson*, 326 U. S. 219.

The argument of the Government that there is a difference between the Regulations with respect to the procedure upon acceptance at the civilian public service camps when Falbo was ordered to report and when Gibson and Dodez were ordered to report is specious and wholly immaterial because the difference in the Regulations is confined only to assignees who showed a change in physical condition from the date of the final-type examination to the date they reported at the camp. There are no differences in reference to examination of those who did not indicate a change of physical condition. At the time Falbo was ordered to report there was no general provision in the Regulations whereby *every* assignee was given a complete final-type *re*examination. At the present time there is no provision in the Regulations for such *re*examination for *every* assignee. The elimination of that portion of the Regulations allowing assignees who indicated a change in physical condition to require reexamination at the camp is wholly immaterial.

The Regulation in respect to reception of every assignee *who did not indicate a change in physical condition*

is identically the same now as it was at the time Falbo was ordered to report. Therefore, when the Government argues that assignees could be rejected upon examination at the camp, it misapprehends and misinterprets the Regulations to this Court.

The Government made it appear to this Court that every assignee reporting at a civilian public service camp was given a complete reexamination physically. This is not according to the facts. The right of a *very* few of the assignees, reporting a change in physical condition, to a complete reexamination certainly cannot be held to constitute an administrative remedy to *every* assignee who had been declared acceptable upon the final-type physical examination. Since it is obvious that the right of some assignees, who reported a change in physical condition, to a reexamination does not constitute an administrative remedy to all of such assignees—all accepted assignees—it cannot be said to be an administrative remedy that must be resorted to by all assignees as a condition precedent to challenge the administrative action.

Therefore for the purpose of determining whether or not there is an administrative remedy, it must be said that the Regulations as they exist now, as they existed at the time Dodez and Gibson were ordered to report, and as they existed at the time Falbo was ordered to report, are identical in that they provide for completion of the selective process at the same point. They *do not* provide for an *administrative remedy* to every assignee against a final order of the administrative agency by reporting to the camp.

Since there is no difference between the Regulations from that standpoint, it must be said that the *Dodez* case is identical with the *Falbo* case in every respect and therefore this Court should reconsider its decision in the *Falbo* case,* overrule the *Falbo* decision, declare that the case was erroneously decided, and set aside the doctrine therein announced.

TWO

Gibson's reporting at the civilian public service camp as ordered and leaving it immediately after acceptance and physical examination did not constitute a waiver of his right to challenge the jurisdiction of the Selective Service System in his defense against the indictment.

Under the Regulations Gibson could not be rejected upon his reporting at the civilian public service camp. Even if the physical examination at the camp had disclosed that he was physically unfit for training and service, he would not have been discharged. The Regulations provided that he would be accepted regardless of the outcome of the physical examination. (Reg. 653.11) As a matter of fact, he was accepted at the camp on August 23, 1944, the day on which he arrived at the camp, when the acting camp director filled out the Report of Physical Examination and Induction (Form 221) forwarded by the local board to the camp, as required by Regulation 653.11 (c). This was several days before he was examined by the camp physician. However, he remained at the camp until he had the physical examination, for which he had come to the camp in the belief that

* Attention of the Court is again directed to the fact that this same argument was urged upon the Court in the Second Petition for Rehearing filed in *Falbo* v. *United States*, No. 73 October Term 1943, pages 10-27, overruled 322 U. S. 770. This same question was presented to this Court in *Grieme* v. *United States*, No. 883 October Term 1943, Petition for Writ of Certiorari, pages 9-13, certiorari denied, 322 U. S. 744.

it was necessary in order to exhaust his administrative remedies, which examination was given him pursuant to Regulation 653.11 (b).

The undisputed evidence shows that Gibson did not go to the camp for the purpose of performing work of national importance. Indeed, the evidence shows without contradiction that he refused to perform any work whatever from the time he got there until he left. The only reason he remained at the camp was because he was awaiting the return of the camp physician. He thought it was his duty to stay at the camp until he had been examined by the camp physician. Gibson believed, based on the legal advice in this Court's decision in the *Falbo* case, that he could not exhaust his administrative remedies until he had submitted to the physical examination for the purpose of finalizing his acceptance. While it may be conceded that he was in error as to where the line was drawn or to what point he had to go in order to exhaust his remedies, yet it must be conceded that he reported at the camp for the sole purpose of exhausting his remedies. After his physical examination, following his acceptance at the camp, he gave the camp director a letter showing why he had reported. The letter proved that he reported at the camp for the sole purpose of taking the physical examination and leaving because he claimed that the Selective Service System had no jurisdiction to order him to report for work of national importance or command him to remain at the camp. [70-71] Indeed, it must be conceded that the undisputed evidence establishes that Gibson in good faith believed that he was required to go to the camp for those purposes. It cannot be contended that he went for an evil or wicked purpose. He did not go to the camp for the sole purpose of defying the law.

He had reasonable grounds to believe that it was necessary to report to the camp and there undergo a physical examination. The decision of this Court in the *Falbo* case

was not clear as to where the line was drawn. Indeed, until this Court decided the case of *Estep* v. *United States*, 66 S. Ct. 423, even the Government stubbornly contended that the line was not reached until the assignee reported for work of national importance, there remained at the camp, and applied for a writ of *habeas corpus*.

In this contention about what the law was the Government erred. Gibson should not be charged with knowing more law than the Government. This is especially true in view of the fact that this Court did not make plain its interpretation of the Regulations in the *Falbo* case.

A comparison of the Regulations, as they existed at the time Falbo was ordered to report, with the Regulations as they existed when Gibson was ordered to report shows that they were not different in respect to the right of every assignee ordered to report to have a physical examination upon reporting to the camp, which could result in his rejection. The Regulations provided that the physical examination was given *only* in event that the assignee *indicated a change* in his physical condition since the final-type physical examination. This was at the time Falbo was ordered to report.

Under such circumstances there was no provision for a healthy assignee, who had experienced no change in physical condition, to get an examination upon reporting at the camp. Accordingly, the Regulations did not provide for examination in all cases or as a regular procedure for all assignees reporting at the camps.

The fact that the Regulations, at the time Gibson was ordered to report, did not provide for an examination did not change the situation. A healthy assignee had no more opportunity to exhaust an administrative remedy by a physical examination at the time Falbo was ordered to report than he did at the time Gibson was ordered to report. It must be presumed that, at the time Falbo was involved,

once an assignee was accepted upon a final-type physical examination by the armed forces under the Regulations his acceptance would continue up to and including the time he was ordered to report, unless, of course, he had been severely injured, developed a chronic and devastating disease or had suffered some other catastrophe.

Certainly no reasonable person reading the Regulations as they existed then, or now, could claim that there is any substantial difference insofar as exhaustion of administrative remedies is concerned. There were no administrative remedies then. There were none when Gibson reported. Accordingly when this Court indicated that it was necessary for one to report at the civilian public service camp and undergo the physical examination as a condition precedent to obtaining judicial review, every reasonable assignee had the right to rely upon the logical inferences to be drawn from the language of, and the decision in, the *Falbo* case. Therefore Gibson was acting upon a command that was implicit in the *Falbo* decision which required him to go to the camp. The failure of the Court to clarify what it meant in the *Falbo* decision cannot be employed now as a *trap* in which to ensnare an assignee who was vainly trying to protect himself against the lawlessness of the administrative agency assuming jurisdiction over him contrary to an express exemption. The Act stated that Gibson, a minister of religion, was not subject to the jurisdiction of the administrative agency.

It would be especially harsh to hold that Gibson waived his rights when there was no showing that he knew where the actual legal line of exhaustion of administrative remedies was drawn. There was no ceremony to indicate where he changed his status from that of an assignee to a campee. There was no act Gibson was required to voluntarily do which indicated to him and the whole world that he was giving up his exempt status. In the absence of an induction ceremony, as in case of selectees for the armed forces, or

of evidence explicitly showing that Gibson intended to waive his rights under the law, there can be no presumption that his act constituted a waiver of his legal rights. *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

It does not appear that Gibson had full knowledge as to where the dividing line was, especially in view of the holding of this Court in the *Falbo* case that the final-type physical examination did not constitute an exhaustion of the administrative remedies. It cannot be said that Gibson had full knowledge of what *in the future* the law *would be declared* to be. Unless it can be shown that he was aware of the consequences of his action and what this court will *now* decide in these cases it cannot be said that he waived his rights. It was impossible for Gibson to know where the dividing line was at the time he reported. Even the Government did not know where the dividing line was at that time, arguing that habeas corpus after induction or reporting was the only remedy. There was confusion in the law resulting from a failure of this Court to be more explicit in its opinion in the *Falbo* case. Under the circumstances Gibson did not waive his rights to challenge the want of jurisdiction on the part of the administrative agency in spite of his going "too far" as contended by the Government. *Pence* v. *Langdon*, 99 U. S. 578, 581; *Provident Life Ins. Co.* v. *Hawley* (CCA-4) 123 F. 2d 479, 482; *Keehn* v. *Excess Ins. Co. of America* (CCA-7) 129 F. 2d 503, 506.

The very most that the situation can be likened to is that of instances where a fine is paid under protest. In such instances it has been uniformly held that there is no waiver of the rights to challenge the imposition of the fine. *Hartwell* v. *United States* (CCA-5) 107 F. 2d 359, 360; *United States* v. *Daschiel*, 3 Wall. 688, 697-702.

In view of the confusion in the law as to where the line is drawn, and since the *Falbo* decision impliedly commanded Gibson to report at the civilian public service camp, it would be wholly unfair to use it as a *trap* in which to en-

snare Gibson and deprive him of his rights under the Act and Regulations.

It will be conceded by the Government that in cases where one reports at the camp and applies for a writ of *habeas corpus* he does not waive his right to challenge the want of jurisdiction of the administrative agency. If one who reports at the camp and there remains, applying for a writ of habeas corpus challenging jurisdiction of the camp, does not waive his rights, of necessity one who reports and refuses to stay should not be waiving his rights.

If a camp does not have jurisdiction to hold an *exempt* registrant applying for a writ of *habeas corpus*, then by force of the same reason a camp would not have jurisdiction under the Act and Regulations sufficient to invoke the criminal process against an "escaped" campee who walked off in violation of the Regulations. Regardless of whether the jurisdiction of the district court is invoked by the Selective Service System to enforce the authority of the camp, or the court is appealed to through *habeas corpus* to break the claims of authority made by the camp, the district court has authority to inquire into the want of jurisdiction and lack of authority of the Selective Service System.

There is no logical reason or clear ground that can be asserted to assume that Congress intended to deprive one who walked off from a camp, after reporting to exhaust his administrative remedies, of his right to challenge the authority of the administrative agency. It is necessary to have some explicit provision in the Act to warrant such a strained and discriminatory conclusion. Certainly Congress did not intend that one charged with a violation of the Regulations by refusing to remain at a camp, after reporting in belief it was necessary to exhaust his administrative remedies, has less rights to protect himself in the courts against an indictment brought for the purpose of sending him to prison under the Act than are accorded to one who wholly refused to report for work of national importance

altogether. To so hold would indeed make a *trap* which would subject those who in good faith went beyond the line marked by the Regulations as a termination of the selective process, and in the honest belief that they were exhausting their administrative remedies, to more severe penalties than those who stayed away altogether in defiance of the board's order to report. *Billings* v. *Truesdell,* 321 U. S. 542, 558-559.

There is no rule of "going too far" in an effort to exhaust one's administrative remedies. Certainly a party to an administrative proceeding would not waive his rights by filing repeated motions for rehearing which are not authorized by the Regulations. The generosity of one in going beyond that which is required by law to exhaust his administrative remedies does not harm the Government.

There is no reason for the new "rule of law" which the government attempts to graft onto the body of administrative law that one can go "too far". The proposed new rule of going "too far" advocated by the Government finds no support whatever in reason or justice.

There is a reason for the rule of law which requires one to exhaust his administrative remedies. The courts are not desirous of taking on a controversy prematurely. The courts want parties subject to administrative acts to exhaust every possible effort to settle their disputes in the agency before appealing to the courts for relief. The rule of exhaustion of administrative remedies is merely a rule of expediency. It is a rule of reason. *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41. But certainly it cannot be said that because one does more than what the law requires (in an effort to obtain administrative relief before precipitating the administrative controversy into the courts) he should be penalized. Indeed, an effort to "re-exhaust" administrative remedies tends to reduce litigation rather than foment it, which a premature appeal to

the courts from administrative action does. Avoidance of the latter is the aim of the rule requiring the exhaustion of administrative remedies.

It has long been uniformly held that where one is assailed by an indictment or proceeding in court he can defend and "The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the right principles of the social compact and of the right administration of justice." *McVeigh* v. *United States*, 11 Wall. 259, 267.

The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U. S. 274, 277-278. There it was said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common inteiligence and conscience of all nations."

It is the duty of this Court to give to the statute a reasonable interpretation. The interpretation given by the Government is wholly unreasonable, in addition to being unsupported by any valid reason. It is unreasonable to suppose that Congress would authorize the Government to proceed against a defendant under the Act and at the same time cut out his defenses as the Government here argues. A reasonable construction requires that this Court impute no such evil intent to Congress. On the contrary, it must be supposed that Congress intended that every defendant prosecuted under the Act would have a fair trial and full hearing.

It is a rule of long standing, established by this Court, that all reasonable doubts concerning the meaning of a statute should operate in favor of the rights of the defendant. In *Harrison* v. *Vose*, 50 U. S. 372, at page 378, this Court said: "In the construction of a penal statute it is

well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. In *United States* v. *Shackford*, 5 Mason 445, Justice Story says: 'It would be highly inconvenient, not to say unjust, to make every doubtful phrase a dragnet for penalties' (p. 450)." Also, in *United States* v. *Kirby*, 7 Wall. 482, at pages 486-487, the Court observed: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of the character. The reason of the law in such cases should prevail over its letter. Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."

Petitioner is therefore in exactly the same position as though he were before the court upon a petition for writ of *habeas corpus*. The only difference is the method in which the question is presented to the court. In a *habeas corpus* proceeding the question would be presented upon an affirmative move initiated by Gibson, who would request the court to pass upon the validity of the order to report. Here the civilian public service camp has invoked the order to report for work at the camp as ground for its jurisdiction, and by affirmative move requests the court to find that petitioner has defied that jurisdiction. The question for the court to decide is whether one illegally classified, ordered to do work of national importance and who reports, must remain at the camp and then apply for a writ of *habeas corpus* as the only remedy.

Stated another way: The court must decide whether one who has exhausted his administrative remedies may be denied his right to challenge the validity of the order upon which an indictment is based, charging him with vio-

lating the Act for failure to remain at the camp and do work of national importance after having completed his administrative remedies.

The Government through syllogism reaches the conclusion that Gibson is in the same posture as Smith and Estep* would have been had they submitted to induction and then deserted from the armed forces. It should be observed that the United States Circuit Court of Appeals for the Eighth Circuit held, in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, that the invalidity of the administrative action could be challenged by a deserter who had been court-martialed in spite of his defiance of the orders of the administrative agency and of the armed forces. The Government cites district court decisions holding, under the 1917 Act, that deserters could not challenge the validity of draft board determinations and the validity of court-martial proceedings resulting from their desertion. (*Ex parte Romano*, 251 F. 762, 764 (D. Mass.); *Ex parte Tinkoff*, 254 F. 912 (D. Mass.); *Ex parte Kerekes*, 274 F. 870 (E. D. Mich.))

This analogy is specious and not apposite, for several reasons. In the first place, there is no induction ceremony or other formality that an assignee is required to undergo before attaining the status of a full-fledged campee. No line is drawn to warn the assignee that he is about to assume a status imposing additional obligations. In the case of a man ordered to report for induction into the armed forces appropriate ceremony is prescribed, affording him opportunity to choose between acceptance of military service or prosecution in the civil court. A campee is and always remains a civilian. He has no opportunity to choose between the status of an assignee and defending his cause in the civil court. The law requires him to report at the camp in order to do work of national importance under civilian direction. (Reg. 652.11, 653.12) Concededly, since there is no

* Petitioners involved in *Estep* v. *United States*, 66 S. Ct. 423.

opportunity to make the choice, it cannot be said that a minister who is attempting to exhaust his administrative remedies by completing the selective process has waived his right to challenge the legality of the administrative action.

The Government contends that it is the unqualified duty of each registrant classified as a conscientious objector to report at a civilian public service camp and there remain until administratively released or judicially released by *habeas corpus*. The Government makes no distinction between registrants liable for the performance of work of national importance and those expressly exempted by Congress from training and service. The Government's argument may be applicable to a person liable for training and service. However, the Government's theory is not applicable to any who are specifically exempted from training and service. It is within the discretion of the Selective Service Director to defer certain persons liable for training and service, or allocate them to perform service elsewhere than in the armed forces. Such persons do not have the same rights as registrants expressly exempted by Congress from training and service. These two types of registrants should not be confused one with the other. It is not a question of the propriety of the classification made within the authority of the classifying agency if an exempt registrant is ordered to report for work of national importance. In such a situation it is rather a question of want of jurisdiction, lack of authority, or *ultra vires* action, on the part of the administrative agency. In such an instance of illegal action, the order is not voidable but is wholly and inherently void.

Even though an exempt registrant should report to a civilian public service camp for the purpose of exhausting his remedies and thereby subject himself to the custody of the director of the camp, this does not confer jurisdiction

upon the camp director. The order to report for induction being void for want of jurisdiction on the part of the board, *a fortiori,* the alleged jurisdiction of the camp director is likewise void for the same reason.

The order of an executive agency commanding a person exempt from military duty to submit to the performance of duty is void for want of jurisdiction. It follows that the orders of a draft board and of a camp director based upon the decision that an exempt person is liable for training and service is "clearly without jurisdiction, cannot protect the officer who executes" them. *Wise* v. *Withers,* 3 Cranch 331, 336.

The rule of the cases alluded to by the Government is confined to instances where the process defied is issued by a tribunal having jurisdiction. Inasmuch as the rule advocated by the Government is confined to process merely voidable rather than void, the analogy does not apply to the conduct of a minister exempt by act of Congress in leaving a civilian public service camp that does not have jurisdiction over him because of the *ultra vires* action of his local board. In this instance the order given Gibson by the draft boards was void rather than voidable, for want of jurisdiction of the local board. Indeed, the draft boards and all persons acting under their direction in assuming jurisdiction over Gibson are liable to Gibson for damages in a tort action at law.* Therefore the cases relied upon by the Government in instances where there has been defiance of a warrant for arrest or escape from a penal institution are wholly inapposite here. Moreover, the line of district court decisions in which it has been held that a deserter could not challenge his classification under the 1917 Act because of his defiance of the authority and taking the

* *Miller* v. *Horton,* 152 Mass. 540; *Pearson* v. *Zehr,* 138 Ill. 48; *Manning* v. *Ketcham* (CCA-6) 58 F. 2d 948; *Wise* v. *Withers,* 3 Cranch 331, 336. See, also, Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927, Harvard University Press, Cambridge, Mass.) pages 44-45, 307-308.

law into his own hands, did not involve situations where the registrant was entirely exempt from all training and service under the Act. Furthermore, these decisions are materially weakened by the decisions of the Circuit Court of Appeals in *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, with which they conflict.

Another position of the Government is that by reporting at and leaving the camp after having exhausted his administrative remedies upon the preinduction physical examination, Gibson defied the law and compelled the administrative authority to invoke the criminal sanctions clause of the Selective Training and Service Act against him. The Government says that Gibson "cannot test in that way the validity of the orders as applied to him." (*Hirabayashi* v. *United States*, 320 U. S. 81, 109; *Giese* v. *United States* (App. D. C.) 143 F. 2d 633, 635, affirmed, *per curiam*, by an equally divided court, 323 U. S. 682. (See "Memorandum for the United States in opposition to the granting of petition for writ of certiorari" in the *Gibson* case, pp. 8, 10.)

Moreover, the Government says that the course taken by Gibson is similar to that of a prisoner in a penal institution who has illegally escaped from custody and who, on being prosecuted for jail-breaking, is denied a defense to such prosecution on the ground that his sentence was irregular or voidable. The Government relies upon three cases.*

The Government's assertion that the *Hirabayashi* decision is apposite here is spurious. The argument is wholly factitious. The question involved there was whether the curfew order was an unconstitutional delegation of author-

* Memorandum in opposition to petition for writ of certiorari, p. 10: "Similarly, a prisoner in a penal institution cannot justify his escape because he is confined under an irregular or voidable sentence; despite the illegality of his imprisonment, he has committed a criminal offense. *Bayless* v. *United States*, 141 F. 2d 578 (CCA-9), certiorari denied, 322 U. S. 748; *United States* v. *Jerome*, 130 F. 2d 514, 519, certiorari denied as to this point, 317 U. S. 606; *Aderhold* v. *Soileau*, 67 F. 2d 259 (CCA-5). For other examples of situations in which, 'even in peacetime, the duty of the citizen to cooperate in effective law enforcement overrides his convenience,' see *Giese* v. *United States*, 143 F. 2d 633, 635 (App. D. C.), affirmed, *per curiam*, by an equally divided court, 323 U. S. 682."

ity and discriminatory. The validity of the exclusion order was not determined. The orders were made on a race or group basis. In that case there was no provision for individual demonstrative determinations. The law did not contemplate individual classifications. There was no provision for exhaustion of administrative remedies. There was nothing said in the Act or the order about administrative determinations respecting loyal citizens as compared with disloyal citizens of Japanese ancestry. It can be assumed that if the law or orders involved in the *Hirabayashi* case provided for exemption of loyal Japanese, or provided for administrative determinations upon an individual basis as a condition precedent to invoking an exclusion order, then an inquiry thereof would have been permitted in a defense to an indictment of one charged with defying the exclusion order.

Even in the absence of an administrative determination on an individual basis, it must be assumed that if the Army did not have jurisdiction and authority over the particular individual or class of individuals, the person thus claiming want of authority could assert it in defense to an indictment based on his alleged defiance of the order. Suppose, in the *Hirabayashi* case that Hirabayashi were a Filipino or a Chinese who had been mistakenly included in the curfew order or the evacuation order. It must be conceded that in such circumstance Hirabayashi, if a Chinese or Filipino (neither of which nationals was within the scope of the order), could prove his nationality and show that the order was *ultra vires* and in excess of the jurisdiction asserted by the armed forces. That is precisely the situation presented here. It would be a violation of due process to compel one not subject to administrative action to comply with it in order to question the want of authority of the administrative agency.

In the *Hirabayashi* case the defendant actually defied the curfew order and the evacuation order. Nevertheless

this court considered his defense that the curfew order was void. In that case the Government did not contend that the defendant was not entitled to raise and the court was not entitled to consider the defenses urged because he had not complied with the order. If a defense as to the *constitutionality* of a particular order can be considered on the ground that it involves a determination of the constitutionality of the curfew order, then with equal force of reason the *courts* can also construe the order or statute and consider whether the particular order is applicable to the facts or is illegal because contrary to the statute authorizing it, in that the person affected is *exempt* or the administrative agency *did not have jurisdiction,* without requiring that he comply with the order. It seems plain that if an order of an administrative agency is legal it should not and can not be flouted; but that if an order of such agency is illegal and void, then as a matter of fact it cannot place any citizen under an obligation to do anything. If the citizen chooses to ignore an invalid, unlawful order, no one would contend that he would be prevented from setting up this fatal defect in any subsequent prosecution that might be instituted against him.

The analogy between the action of Gibson and that of an escaped convict is wholly factitious and syllogistic. It is based upon an assumption of fact that does not exist. Like a house built upon a foundation of sand, it appears to be apposite. Yet when subjected to the turbulent waters of truth, the foundation melts away and the structure of the argument collapses. In the case of an escaped convict charged with jail-breaking, the prosecution is not based upon the judgment and commitment that placed him in custody. The commitment is wholly collateral. The jail-breaking is incidental to the original judgment. Prosecution for jail-breaking is based upon a statute specifically prohibiting jail-breaking. Prosecution in the instant case is directly

based upon alleged defiance of an administrative order which is directly challenged in the proceedings.

In the *Gibson* case the administrative authority has been directly invoked by the civilian public service camp in delinquency proceedings through indictment charging Gibson with a violation of the administrative order. Gibson says that the administrative order is void for want of jurisdiction of the camp and of an administrative agency. He says that the order is *ultra vires* and that it is wholly void. It is more than voidable. When the supposed analogy claimed by the Government between the act of Gibson and that of an escaped convict is subjected to this test, it disappears as an illusion.

In cases involving prosecutions for prison breaks the prisoner is confined because of his violation of the law. In the case at bar *Gibson* was confined at a civilian public service camp because this court in the *Falbo* case ruled that he had to go there to exhaust his administrative remedies, on account of the violation of the law by the administrative agency. Since the board had no jurisdiction because he was exempt as a minister of religion from all training and service under the Act, the camp had no jurisdiction. This can be shown in actions instituted under Section 11 of the Act to enforce the orders of the administrative agency.

The proceedings in the *Gibson* case are more nearly analogous to contempt proceedings based upon defiance of the order of court than the Government's "escaped convict" simile. The decision styled *In re Burrus* (136 U. S. 586) held that one who defied the order of a court could challenge the validity of the order on the grounds of want of authority, *ultra vires*, or excess of jurisdiction to make the order. See also *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.

It is indeed unfair to deny a minister of religion, who has attempted to protect his rights under the act, his right

to challenge the legality of the administrative action because he went *'too far'* when he reported in good faith in an attempt to complete the selective process as suggested by this court in the *Falbo* and *Billings* decisions. The Government says that the petitioner assumed the risk of following such suggested course of action. The Government would have this court treat petitioner much worse than a man treats his dog. The dog, unaware of the law made for him in the chambers of his master's mind, does not know he has made a mistake until he is whipped by his master. But even a dog is not punished when he does what he is told to do.* Here, however, the Government would have the court punish Gibson for doing what this court impliedly, if not expressly, suggested in the *Falbo* and *Billings* decisions. Gibson respectfully asks, Is not the Government asking the Court to go *'too far'?* Will compliance with the Government's request be "equal justice under law"?

*"Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk: common law by its very essence. It is the Judges (as we have seen) that make the common law:—Do you know how they make it? Just as a man makes laws for his dog. When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way Judges make law for you and me. They won't tell a man before hand what it is he *should not do*, they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."—TRUTH in Jeremy Bentham's *Truth* versus *Ashhurst* (London, December 17, 1792; printed in 1823 by T. Moses, 30, Wilderness Row, London, England.)

THREE

The construction placed upon the Act and Regulations by the courts below denies petitioners their right to challenge the jurisdiction of the draft boards and the legality of the orders supporting the authority of the civilian public service camps in violation of due process of law, contrary to the Fifth Amendment to the United States Constitution, and denies them a judicial trial contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution.

Since it is conceded that each petitioner reached the point where his administrative remedies had been exhausted, it must be concluded that each was qualified for judicial review of the administrative action as a defense against each indictment. The undisputed evidence and the record show that this right was denied each petitioner.

If the Act and Regulations, as applied in these cases, are to be construed so as to deny one the right to a judicial review of the administrative action in response to the indictment, then such construction and denial is contrary to the due process clause of the Fifth Amendment to the United States Constitution. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *Estep* v. *United States,* 66 S. Ct. 423, 429-433, concurring opinion of Mr. Justice Murphy.

Moreover, to deny Gibson his right to be heard in his defenses in response to the indictment because he is charged by the Government with going "too far" is an arbitrary and

capricious denial of a judicial trial. If the Act and Regulations be construed to sustain such an abridgment of the right to a judicial trial, then such construction transforms the Act and Regulations into a Bill of Attainder, contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution. *Cummings* v. *Missouri,* 4 Wall. 277, 320-332; *United States* v. *Lovett,* No. 809, October Term 1945, 14 L. W. 4399, 66 S. Ct. 1073, decided June 3, 1946; *Kentucky* v. *Jones,* 10 Bush. (70 Ky.) 725.

The argument of the Government that alleged violators of the Act, such as petitioners here, cannot challenge those orders in defense to an indictment and that the only remedy one has is to remain in camp and apply for a writ of *habeas corpus,* requires the Court to place an unreasonable and unconstitutional construction upon the Act. Additionally, it raises "a succession of constitutional doubts as to such interpretation." (*Harrison* v. *Interstate Commerce Commission,* 211 U. S. 407, 422) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Kirby,* 7 Wall. 482, 486-487; *United States* v. *American Trucking Ass'n,* 310 U. S. 534.*

* The unconstitutionality of the Act as construed and applied in this manner was exhaustively argued to this Court in *Smith* v. *United States,* No. 66 October Term 1945 and *Estep* v. *United States,* No 292 October Term 1945, in joint brief for petitioners at pages 85-105. For further and more exhaustive argument on this proposition, the Court is here and now referred to that argument in such brief.

FOUR

The holdings of the courts below that petitioners could not challenge the jurisdiction of the draft boards in their trials because they had not resorted to the remedy of *habeas corpus*, were fundamental errors requiring reversal of convictions.

It is not necessary to argue this point exhaustively. Obviously, if these petitioners were denied their right to make a defense that was available under the indictment, petitioners are entitled to a new trial in each of these cases. The Government, of course, will undoubtedly argue that the error on the part of the courts below, in rejecting the evidence and in holding that no defense was available, is harmless error.

A similar effort was attempted by the court of appeals in the case of *Smith* v. *United States*, 148 F. 2d 288. (See the last point discussed in that opinion.) This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. There the trial court failed to pass upon the issue raised. It refused to permit the jury to consider the issue. The questions for determination by the court and jury were limited to whether or not the defendant complied with the order. The same failure to exercise the judicial function is prevalent here. The trial courts did not pass upon the merits of petitioners' defense. If the Government can now argue the merits of the classification given petitioners, then it was also the duty of the trial court in each of these cases to consider the defense. Inasmuch as the trial court did not consider it or permit the jury to consider it, the error cannot be cured by the rationalization of the Government.

The rule announced by this Court in *Estep* v. *United States*, 66 S. Ct. 423, 429, is applicable: "Since the peti-

tioners [Smith and Estep] were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

FIVE

The trial court committed reversible error in excluding the proof offered by Gibson, and in refusing the requested finding of fact and conclusion of law tendering the issue of Gibson's good faith and honest belief that he was exempt from training and service and that the civilian public service camp director had no jurisdiction to command him to remain at the camp.

Upon the trial of his case Gibson offered evidence, in an effort to show his good-faith belief that he was exempt as a minister of religion and that the civilian public service camp had no jurisdiction over him. [48, 73] This evidence was excluded, to which he excepted. [48, 73] In his request for finding and conclusion number 27, Gibson requested the trial court to find and consider whether Gibson in good faith honestly believed that he was exempt as a minister of religion and that the civilian public service camp, therefore, had no right to ask him to remain. [90]*

This proposition is advanced only as an alternative ground for reversal. In event this Court finds that the *Gibson* case should be reversed because of the trial court's refusal to consider whether or not the administrative agency exceeded its jurisdiction, it will be unnecessary for this Court to determine this question. Only in the event that the Court holds that Gibson was not entitled to make his defense in response to the indictment is this proposition advanced. If the Court finds that he went "too far", then,

* The request was not printed as a part of the record in this case. It appears in the typewritten transcript of the record on file with the Clerk, pages 99-100.

under all the facts and circumstances, since he was acting in good faith in an effort to exhaust his administrative remedies by reporting to the civilian public service camp, as this Court indicated in the *Falbo* case that he should do, it seems, at least, that his good faith should have been considered by the trial court in considering whether or not he was guilty. This was not considered by the trial court.

The trial judge, in his rejection of the evidence and by his refusal of the requested finding, held that the honest, good-faith belief of Gibson was not material as a defense to the indictment. To support the proposition that good faith in the *Gibson* case is an issue that should have been considered and that the court erroneously refused to consider, Gibson relies upon *Keegan* v. *United States,* 325 U. S. 478, 493-494; *United States* v. *Murdock,* 290 U. S. 389, 394-396. See also *Okamoto* v. *United States* (CCA-10) 152 F. 2d 905. In the *Murdock* case the defendant was convicted for wilfully and knowingly failing to supply information as to his income. The grounds for the refusal were that he believed that he was exempt on the items inquired about and that the Constitution guaranteed him the right to decline to incriminate himself. This reasonable belief of exemption, which was erroneous, and the fear that he might incriminate himself, entitled the jury to consider that if he had good faith he would not be convicted of wilfully refusing to give the information.

Gibson believed that he had a right to leave the camp after getting his physical examination, and that all required of him was to exhaust his remedies. This reasonable belief based upon the facts of his case, and his reliance upon this Court's legal advice contained in the *Falbo* and *Billings* cases, *supra,* entitled him to have the court consider his good faith in refusing to remain at the camp.

The term "knowingly" as used in the Selective Training and Service Act is synonymous to the word "wilfully".

It does not mean "voluntarily" or "unintentionally". It means prompted by a bad faith or with an evil intent or for an illegal purpose. It means without legal justification. If Gibson had legal justification or reasonable grounds for belief that he was legally justified in leaving the camp, then it cannot be said that he illegally, knowingly, and unlawfully failed to perform a duty required of him under the Act.

The well-known presumption that a person intends the natural consequences of his acts is rebuttable, but a specific intent is an essential element of the offense charged. *Laws v. United States,* 66 F. 2d 870.

If the court were invoking the presumption that men intend the natural and probable consequences of their acts, its rulings were equally in error. The presumption of wrongful intent based on the natural consequences of one's words or acts is not a conclusive presumption but a rebuttable one, and this rebuttal may take the form of testimony by the defendant himself that he intended no such result, and an instruction that accused could not contradict the assumption flowing from his act was held to be reversible error. *Bentall* v. *United States,* 262 F. 744; *Laws* v. *United States,* 66 F. 2d 870. Such a presumption is not applicable in the presence of positive proof that defendant had a different intent. *McDonald* v. *United States,* 9 F. 2d 506; *Blumenthal* v. *United States,* 88 F. 2d 522. A presumption that men intend the natural consequences of their acts is not applicable in the face of affirmative proof that defendant had a different intent. An instruction that if the defendant committed certain acts of violence knowing their effect, intent would be presumed, was held to be reversible error. *McDonald* v. *United States, supra.* It has been authoritatively held that a defendant may by his uncorroborated testimony rebut the presumption that one is presumed to intend the natural and probable consequences of

his act, in fact that it may be "easily" rebutted. *Weiss* v. *United States,* 122 F. 2d 675; cert. den. 314 U. S. 687.

Wilfulness "is something over and above the mere intent to do a thing." *United States* v. *Saglietto,* 41 F. Supp. 21. Where an offense is criminal only when knowingly and wilfully done, it is necessary not only to prove knowledge of the act but to prove that it was done with a bad intent. *Bentall* v. *United States,* 262 F. 744. When an act or omission is a crime only if it is "wilfully" done, a specific wrongful intent is of the essence of the offense; that is, there must be not only knowledge of the existence of the obligation but a wrongful intent to evade it. *Hargrove* v. *United States,* 67 F. 2d 820.

Criminal intent has been defined as "a mind at fault before there can be a crime"; as such it is an essential fact to be proved in the establishment of guilt; though Congress may define an offense without unlawful intent, a statute will not be so construed unless such legislative intent is clear. *Masters* v. *United States,* 42 App. D. C. 350; *United States* v. *Burroughs,* 65 F. 2d 796, affirmed in part, 290 U. S. 534.

Thus, when specific intent is a part of the crime, the existence of such intent must be proved as a fact like any other fact in the case, and it is not presumed from the commission of an unlawful act. *Parkersburg Transportation Company* v. *City of Parkersburg,* 107 U. S. 691; *Savitt* v. *United States,* 59 F. 2d 541; *United States* v. *Burnett,* 53 F. 2d 219; *United States* v. *Houghton,* 14 F. 544; *Herrman* v. *Lyle,* 41 F. 2d 759. A criminal intent is necessary unless the statute otherwise provides. *Nosowitz* v. *United States,* 282 F. 575.

"There can be no crime, large or small, without an evil mind. In other words, punishment is a sequence of wickedness, without which it cannot be."—*Bishop on Criminal Law*, Secs. 287, 288.

As said in *Felton* v. *United States*, 96 U. S. 699: " . . . doing or omitting to do a thing knowingly or wilfully implies not only knowledge of the thing but a determination with a bad intent to do it or to omit doing it."

In this case Gibson had good and reasonable grounds for believing that he could not be required to report and remain at the camp, which should have been considered in determining the guilt of the defendant.

The Act defines guilt as the failure to perform a duty imposed by the Act. If Gibson has no duty or because of an exemption provided by the Act in good faith believes he has no duty, the court and jury should consider it. The failure to comply with the order does not conclusively establish a violation of a duty under the Act. There are other factors which may be considered. If a selectee is ill, had an accident, was prevented from appearing by storm or mistake, he could show that in defense. (*United States* v. *Hoffman*, 137 F. 2d 416; *United States* v. *Grieme*, 128 F. 2d 811)* Similarly, good-faith belief that the order is invalid is also permissible as a defense.

* Cf. *United States* v. *Madole* (CCA 2) 145 F. 2d 466.

Conclusion

The judgments of the courts below should be reversed and the indictments ordered dismissed. In the alternative, the judgments should be reversed and the causes remanded to the trial courts for new trials not inconsistent with the opinions that may be written herein.

Respectfully submitted,

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